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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>VERONICA TORRES,<br><br>Petitioner. | 2 CA-CR 2009-0302-PR<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-047395

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

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A. Bates Butler, III
Tucson
Attorney for Petitioner

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K E L L Y, Judge.

**¶1** In this petition for review, Veronica Torres challenges the trial court's order dismissing the petition for post-conviction relief she filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Finding none, we deny relief.

**¶2** In 1994, when Torres was fourteen years old, she shot and killed a member of a rival street gang. She was tried as an adult and convicted of first-degree, premeditated murder, drive-by shooting and four counts of aggravated assault. The trial court sentenced her to life imprisonment for the murder and concurrent, presumptive terms of imprisonment on the remaining counts. We affirmed her convictions and sentences on appeal. *State v. Torres*, No. 2 CA-CR 95-0728 (memorandum decision filed Jan. 31, 1997). Torres filed her first petition for post-conviction relief in 1998. The trial court summarily dismissed that petition, and Torres did not challenge the court's ruling.

**¶3** Torres filed the petition at issue here in 2009, claiming newly discovered evidence entitled her to a new trial. She asserted that scientific discoveries about the development of the human brain, unavailable at the time of her trial, show that adolescents who, like Torres, have suffered abuse during childhood are less able than adults to engage in rational thought and refrain from engaging in impulsive behavior. Essentially, she contended, as she does on review, that new scientific evidence shows she "was likely incapable of forming the requisite mens rea for first degree murder because she was in a stage of physiological development of her adolescent brain at which the brain was controlled primarily by the impulsive and hyperactive amygdal[a]." She also argued that, had such evidence been presented at trial, "it is highly unlikely a rational trier of fact would have concluded beyond a reasonable doubt that [she had] deliberately intended to kill anyone."

**¶4** The trial court determined that the scientific evidence was, indeed, newly discovered for purposes of Rule 32.1. It denied relief, however, because it concluded the

defense it supported—diminished capacity or responsibility—"was not and is not recognized by the courts in Arizona as a [valid] defense to a criminal act." *See State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997) ("Because the legislature has not provided for a diminished capacity defense, we have since consistently refused to allow psychiatric testimony to negate specific intent."); *State v. Laffoon*, 125 Ariz. 484, 486, 610 P.2d 1045, 1047 (1980) (rejecting "theory of diminished responsibility which allows evidence of mental disease or defect, not constituting insanity . . . to be admitted for the purpose of negating criminal intent"); *State v. Schantz*, 98 Ariz. 200, 205 n.1, 403 P.2d 521, 524 n.1 (1965) (rejecting instruction permitting not guilty verdict if defendant "was suffering from a mental impairment, defect, disorder, or deficiency so as to be incapable of entertaining malice aforethought").

**¶5** On review, Torres contends the trial court "mischaracterize[d her] claim as [asserting] the defense of reduced or diminished capacity." She argues that *Mott*, *Schantz* and other diminished-capacity-defense cases are distinguishable from her own because they "involved defendants who had originally had the capacity to form intent, but that capacity had been diminished somehow, whether by disease, voluntary intoxication, or other subsequent events." Torres asserts, on the other hand, that she "likely . . . never had the requisite intent to form the mens rea for first degree murder because the new scientific evidence demonstrates that she was likely physiologically and biologically incapable of forming such intent." She contends the trial court "erred in characterizing [her] claim as that of reduced or diminished capacity, because [her] claim is not based on

a disease or defect of the mind, but rather on evidence about the normal development of the adolescent brain."

**¶6** But nothing in the case law suggests that the availability of a diminished-capacity defense depends upon the reason for the alleged incapacity. It is the claim of incapacity itself, short of the insanity test, that the legislature rejected and the courts have no authority to allow as a defense to criminal charges. *See Mott*, 187 Ariz. at 541, 931 P.2d at 1051. The trial court did not err in characterizing as a claim of diminished capacity Torres's assertion that she had been incapable of premeditating the murder or forming the requisite intent to kill. Nor did the court abuse its discretion by summarily dismissing her petition for post-conviction relief. A petitioner is entitled to a hearing pursuant to Rule 32.8 when she presents a colorable claim—"that is a claim which if [the] allegations are true might have changed the outcome" of her case. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). As the trial court correctly found, evidence of Torres's diminished capacity could not alter the outcome of her case because it is inadmissible. Accordingly, although we grant Torres's petition for review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge